# APPENDIX

## APPENDIX

*Filed Jan 17 1975*
*H. Stuart Cunningham, Clerk*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNTED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES EDWARD FINN, JOEL MERVYN GLICKMAN, PHILIP THEODORE JANIS, and CALVIN SIRKIN,

Defendants.

NO. 74 C 2925

*A True Copy Attest*
*H. Stuart Cunningham, Clerk*
*By /s/ Jeanette M. Grady*
*District Clerk*
*U.S. District Court*
*Northern District of Illinois*
*Date: Feb 3 1975*

### MEMORANDUM OPINION

Motion to Dismiss, Motion for Ruling on Sufficiency of Response to Requests for Admission, and Motion to Suppress.

*Motion to Dismiss*

The great majority of issues raised in this motion have already been resolved by the Seventh Circuit in *United*

*States* v. *Cappetto*, [502] F.2d [1351], No. 74-1350 (7th Cir. 1974), and though defendants seem aware that we are bound by this precedent, they nonetheless futilely attempt to re-argue the correctness of *Cappetto*. Defendants' energies are better saved for a proper court of review.

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IV. Defendants also argue that §1964 creates a Bill of Attainder, and examines the cases of *Boyd* v. *United States*, 116 U.S. 616 (1886) and *United States* v. *Coin & Currency*, 401 U.S. 715 (1971). While we do not agree with defendants that §1964 creates such a bill, we do confess that we are greatly troubled by the inadequate attention which the Seventh Circuit gave to its discussion of *Boyd, supra*, and *In re Winship*, 397 U.S. 358 (1970). With no disrespect intended to our appellate court, we think they by-passed the key issue underlying the thrust of defendants' attack on the Organized Crime Control Act. *In re Debs*, 158 U.S. 564 (1895), leaves no doubt about the correctness of the *Cappetto* decision, insofar as that decision finds Congress' power to regulate activities affecting interstate commerce permits the creation of both civil actions and criminal prosecutions for the same act. 158 U.S. at 594. Our concern is what due process rights attend an action brought pursuant to 18 U.S.C. §1964. As defendants note, to be guilty of racketeering one must be engaging in criminal activities forbidden by 18 U.S.C. §§1084, 1952, or 1955. We fail to understand how a civil proceeding could be any more in substance a criminal one than the one herein. This is not to imply the unconstitutionality of 18 U.S.C. §1964, but rather to argue that *Boyd* compels that any proceedings of a quasi-criminal nature, like this one, are subject *inter alia*, to the strictures of the Fourth Amendment and that portion of the Fifth Amend-

ment dealing with self-incrimination. Further, under *In re Gault*, 387 U.S. 1 (1967) and *In re Winship, supra*, these proceedings must be subject to a standard of proof "beyond a reasonable doubt." The Court said in *Winship*, "It is . . . important that in a free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." 397 U.S. at 364. The stigma which attaches at a delinquency proceeding is bottomed, to some extent, on a finding that the accused committed a crime. 397 U.S. at 374. The exact same stigma attaches to the enjoining of racketeering. See 18 U.S.C. §1961 (1)(B). Hence we conclude that civil proceedings like those being conducted herein are subject to a criminal burden of proof.

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V. Finally, defendants argue that *Cappetto* and *Boyd* are factually distinguishable in a manner which makes *Boyd* the applicable precedent here, and not *Cappetto;* specifically, defendants contend that *Boyd* was distinguished in *Cappetto* because it was a forfeiture case, and that in *Finn* there are two forfeiture cases and a criminal case pending.

The short answer to this is that we consider both *Boyd* and *Cappetto* applicable to this case. *Boyd* says that certain forfeiture proceedings are quasi-criminal in nature and that certain constitutional rights attach to those proceedings. *Cappetto,* strictly construed, says that the Organized Crime Control Act is not unconstitutional simply because it allows for both civil actions and criminal prosecutions for the same acts. *Cappetto* does not speak to the due process rights to which defendant is entitled in the civil proceeding.

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*Motion for Ruling on Sufficency of Responses to Requests for Admissions*

Plaintiff government objects to the sufficiency of defendants' answers to divers "requests to admit" which invoke the Fifth Amendment privilege against self-incrimination. One of the few cases directly on point, *Federal Deposit Insurance Corporation* v. *Logsdon,* 18 F.R.D. 57 (1955), holds that since neither Rule 36(b) nor any other statute guarantees a defendant absolute immunity from federal criminal prosecution, and since an admission may well become a vital, factual link in the chain of evidence necessary to establish the existence and commission of the crime for which one has been indicted and faces pending prosecution, requiring a defendant to give self-incriminating testimony would be violative of Fifth Amendment rights. Professor Wright, member of the Advisory Committee on Civil Rules to the Judicial Conference of the United States, agrees that the better view of Rule 36(b) is that a party in answering a request for admissions is entitled to the same constitutional protections as if he were called as a witness. 35 F.R.D. 39, 92. Finally, *United States* v. *Fishman,* 15 F.R.D. 51 (1953), indicates that the proper method of invoking the privilege is to answer the request for admissions by so claiming, as was done herein.

We find, then, that defendants' response to plaintiff's request is sufficient.

Enter:

/s/ *Abraham Lincoln Marovitz*
Judge

Dated: January 17, 1975